Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The

# Supreme Court of the United States of America

WALTER RAYMOND STOCK,

*Petitioner*

vs.

THE STATE OF TEXAS,

*Respondent*

On Petition for Writ of Certiorari from the
Court of Criminal Appeals of the State of Texas

## PETITION FOR WRIT OF CERTIORARI

Paul R. Shunatona
*Counsel of Record*
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Dallas, Texas 75201
Office (214) 747-8844

43pp

## QUESTION PRESENTED FOR REVIEW

The Fifth District Court of Appeals of the State of Texas denied the Petitioner due process of law under the Constitution of the United States for it's disregard of procedural protections afforded the Petitioner to the extent that said Court did not act as a neutral and independent body and there by prejudiced the Petitioner to his detriment.

## PARTIES TO THE PROCEEDING

PARTIES

| | |
|---|---|
| WALTER RAYMOND STOCK | Appellant |
| THE STATE OF TEXAS | State |

COUNSEL FOR PETITIONER

| | |
|---|---|
| Mr. Paul R. Shunatona<br>211 N. Record St.<br>Suite 450<br>Dallas, Texas 75202<br>(214) 747-8844 | Attorney on Petition |

COUNSEL FOR THE RESPONDENT

| | |
|---|---|
| Ms. Kim Schaefer<br>Assistant District Attorney<br>Frank Crowley Courts Building<br>133 North Industrial Blvd.<br>Dallas, Texas 75207-4399<br>(214) 653-3600 | Attorney for the State |

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### CONSTITUTION

United States Constitution V Amendment
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### CASES

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 234.

Cotton v. State, 893 S.W.2d 200 (Tex.App-Ft.Worth 1995, No pet.)

Galvan v. Press, 347 U.S. 522, 530, rehearing denied 348 US 852.

Griffin v Illinois, 351 US 12, 17, 76 SCt 585. rehearing denied 351 US 958.

Schweiker v McClure, 456 US 188, 195.

Strauder v State of WVa, 100 US 303, 310.

### STATUTES

28 USC Section 1257(a)

## RULES

Supreme Court Rule 10(c)
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Supreme Court Rule 13(1)

Texas Rules of Appellate Procedure 105(b)
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**CITATION OF OPINIONS AND ORDERS ENTERED BY THE COURTS**

(See Appendix)

1 Court of Appeals, Fifth District of Texas at Dallas, Denial of Motion to Abate for a Hearing to have Trial Court Amend Conditions of Probation March 5, 1999

2 Court of Appeals, Fifth District of Texas at Dallas, Clerk's letter of October 6th, 1999, indicating that Petitioner, Appellant's Request for Oral Argument was Denied

3 Court of Appeals, Fifth District of Texas at Dallas, Order Denying Motion to Strike Appellee's Brief and Denial of Motion for a Published Opinion October 29, 1999

4 Court of Appeals, Fifth District of Texas at Dallas, Judgment affirming trial court judgment, November 5th, 1999

5 Court of Appeals, Fifth District of Texas at Dallas, unpublished Memorandum Opinion in Support of Judgment November 5th, 1999

6 Court of Appeals, Fifth District of Texas at Dallas, Denial of Appellant's Motion for Rehearing January 5th, 2000

7 Official Notice from Court of Criminal Appeals of Refusing Appellant's Petition for Discretionary Review on April 5th, 2000

**TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA**

COMES NOW WALTER RAYMOND STOCK, PETITIONER herein who makes this his Petition for Writ of Certiorari concerning The State of Texas, Respondent herein, and would respectfully show the Court as follows:

**Basis for Jurisdiction**

On November 5, 1999, a judgment and memorandum opinion regarding the Petitioner were issued by the Fifth District Court of Appeals at Dallas, Texas A Petition for Discretionary Review was filed by the Petitioner with the Texas Court of Criminal Appeals, the state court of last resort and was refused The date of the judgment or order sought of the court of last resort to be reviewed is April 5, 2000 No motion for rehearing was made The statutory provision that confers to this jurisdiction is submitted under 28 USC Section 1257(a), as well as Rule 13 as this is a petition made from a discretionary review by the state court of last resort and is filed within 90 days after the entry of the order denying this discretionary review Rule 13(1)

## UNITED STATES CONSTITUTIONAL PROVISIONS

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

***

### AMENDMENT XIV

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

## STATEMENT OF THE CASE

The review sought is from a State Court judgment The instance in which the issue was raised was at the level of the Court of Appeals, said Court having not complied with the Constitutional protections of due process of the law The manner in which the complaint for lack of due process was raised was by a Motion for Rehearing filed with the 5th District Court of Appeals at Dallas, Texas on November 19th, 1999, which was denied on January 5th, 1999 Petitioner's application for a Petition for Discretionary Review to the Court of Criminal Appeals of Texas, the highest Court of Review in this State, was denied on April 5th, 2000 In the Motion for Rehearing filed in the 5th District Court of Appeals of Texas at Dallas, the due process issue was raised in a six page motion submitted by Petitioner, attached in the appendix, herewith, and therein specifically, the Petitioner asserted in his Motion for Rehearing filed on November 19th, 1999, (see appendix), the following:

> In a Motion filed with this Court on October 25th, 1999, the Appellant moved to strike the Appellee's Brief for the reasons that the Appellee's brief was not timely filed within 30 days after the Appellant's brief was filed Texas Rules of Appellate Procedure at 386(b) The Appellee's deadline came and went without the Appellee's brief being filed and was in fact filed over four months late No Motion to Extend Time for the filing of the Appellee's

brief was filed with this Court pursuant to the Texas Rules of Appellate Procedure at 105(b) In the Court's wholesale disregard of the Texas Rules of Appellate Procedure this Court is essentially allowing the State to thumb it's nose at applicable procedural rules, and as such the Court has taken itself out of being a neutral and detached court of law Would the Court ever allow the same flagrant disregard of procedural rules in a civil appeal? The Appellant submits that this rule breaking would never be tolerated in a civil appeal The Court has essentially assisted the State in the appeal This is significant because the Court relied on the argument set forth by the State in it's brief in most points and relied on a case submitted by the State in it's brief, *ie* Cotton v. State, 893 SW2d 200 (TexApp-FtWorth 1995, No pet), in it's summary disposal of Point of Error No 4

Further, in the Petitioner's Motion for Rehearing at the appellate court level, the Appellant submitted:

> In the Appellant's brief filed March 15th, 1999, oral argument was requested On October 6th, 1999, this court denied the Appellant oral argument On August 25th, 1999, the Appellant filed a Motion to Strike Appellee's Brief for the reasons stated heretofore, and also filed a

Motion for Published Opinion On October 29th, 1000, the court denied the Motion to Strike Appellee's Brief and gave no reason for doing so The court further denied the Motion for a Published Opinion on the basis that it was premature The case was submitted to the court on November 5th, 1999, and *the case was decided the same day* The Appellant was not allowed an opportunity to cure his "premature" Motion for Published Opinion This court in it's decision regarding three points of error made only findings of fact and did not rule on whether the factual matters asserted by the Appellant in his brief were allowed by law.

For these reasons, the Appellant was denied due process of law as guaranteed him by the Constitution of the United States

## ARGUMENT

Quite simply, the Petitioner herein was denied his due process rights afforded him by the United States Constitution Fair play is the essence of due process Galvan v Press, 347 US 522, 530. rehearing denied 348 US 852. The Fourteenth Amendment to the Constitution of the United States is to be construed liberally to carry out the purpose of the framers Strauder v State of WVa, 100 US 303, 310.The prohibition against depriving any person of life, liberty, or property without due process of law extends to the actions of anyone who by virtue of public position under the state government deprives another of any rights secured by that amendment Chicago, B & QR Co v Chicago, 166 US 226, 234 The Petitioner was not afforded due process of law by the Fifth District Court of Appeals of Texas at Dallas, hereinafter called ("Court of Appeals") for it's multiple violations of procedural matters to the extent that the Court of Appeals itself became less than an impartial tribunal and more the instrument of the State and it's prosecution In the appendix presented herewith it is shown that the Petitioner was not given due and sufficient consideration by the Court of Appeals In short, the following rulings demonstrate the unfairness the Petitioner suffered They are as follows:

1. Petitioner's request for Oral Argument was denied
2. Petitioner's Motion to Strike Appellee's Brief was denied as well as Petitioner's Request for a Published Opinion

3. The unpublished Memorandum Opinion in Support of Judgment dispensed with Petitioner's appeal on the same day that it was submitted Said opinion consisted of the summary dismissal of five points of error raised by Petitioner in less than one page of substantive discussion

4. The Court of Appeals denied Appellant's Motion for Rehearing where he urged the due process violations now before the Court

In a letter from the Court of Appeals dated October Sixth, 1999, (see appendix) the Court of Appeals denied Petitioner oral argument on his appeal stating that it would "not significantly aid it in determining the legal and factual issues presented in the appeal" Although this practice is allowed under the Texas Rules of Appellate Procedure at Rule 398, this certainly is not a practice to be favored and Petitioner submits that this practice is rarely engaged in by this Honorable Court, if at all Accordingly, the Petitioner was denied the opportunity to advance his five points of error on appeal

On October 29th, 1999, the Court of Appeals denied a Motion for Published Opinion as well as a Motion to Strike the Appellee's Brief (see appendix) The Motion for Published Opinion was denied on the basis that it was premature This is significant in that the Court of Appeals decided the case on the same day that it was submitted to the Court of Appeals and did not allow the Petitioner an opportunity to "timely" urge his Motion for Published Opinion

The Motion to Strike the Appellee's Brief was likewise denied and in large measure points up the egregious nature of the Court of Appeals actions The Petitioner's brief was filed with the Court of Appeals in accordance with state rules The brief for the Respondent was not filed timely and was in fact filed approximately *four and one-half months late* No motion to extend time for the filing of the Respondent/Appellee's brief was filed with the Court of Appeals as is required by Texas Rules of Appellate Procedure at Rule 105 (b) Accordingly, the Respondent's brief should have been struck In the Court of Appeal's order, no reason whatsoever is given for the denial of the Motion to Strike Appellee's Brief Despite the fact that it is outside the record, this practice is allowed by the Court of Appeals on a regular basis Petitioner respectfully submits that this Court would not allow such conduct and accordingly, the Court of Appeals abandoned it's impartiality and in essence was assisting the State in it's response to the Petitioner's appeal Due process demands impartiality on the part of those who function in a judicial or quasi-judicial capacity Schweiker v McClure, 456 US 188, 195. In this case no impartiality was given the Petitioner As such, the State Court has decided an important question of federal law that has not been, but should be settled by this court, Rule 10(c) Constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons Griffin v Illinois, 351 US 12, 17, 76 SCt 585. rehearing denied 351 US 958. In fact, this disparate treatment of the Petitioner and the Respondent may

very well raise the question of equal protection, because the state was given an advantage Id at SCt 592

Although the Petitioner requested oral argument and a published opinion, the Court of Appeals dispensed with the Petitioner's five points of error in approximately one page of text The Memorandum Opinion in Support of Judgment was apparently written by David F Farris, a Judge who was assigned to the case and not an elected member of the Court of Appeals As previously stated, this opinion was written on the same day the case was submitted to the court, which effectively precluded the Petitioner from "timely" moving for a published opinion This summary disposal of the Petitioner's appeal is indicative of the fact that no true review was given to those matters raised by the Petitioner Because some of those matters were nothing more than mere statements of fact finding, it effectively precluded the Petitioner from raising legal arguments in a Petition for Discretionary Review with the Court of Criminal Appeals of the State of Texas As previously mentioned , the Court of Appeals should have struck the brief of the State Instead, the Court actually relied on a case submitted by the State in it's opinion, and most certainly relied on their untimely brief This abhorrent lack of consideration of Petitioner's Appeal begs to be reviewed

As further insult to injury, the same assigned justice, David F Farris was assigned the Motion for Rehearing filed by the Petitioner The motion was denied without explanation

Accordingly, these issues are before the court and taken individually, each constitutes a due process violation and cumulatively constitute an egregious violation and cry out for a true review of the Petitioner's claims and reassignment to a court of appeals in Texas other than the Fifth District Court of Appeals at Dallas, Texas, and striking the state's brief because that court unfairly denied Petitioner his rights and in effect lost it's neutral and detached position as a tribunal

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant his Petition for Writ of Certiorari and hear all the issues fairly contained within and for other further general relief both at law and in equity to which Petitioner may show himself justly entitled

Respectfully submitted,

Paul R Shunatona
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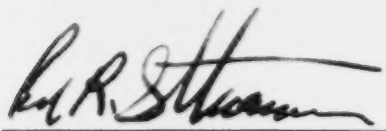
By: 

Paul R Shunatona
Texas State Bar No 18328400
Attorney for Petitioner

# APPENDIX

**Order issued January 5, 2000.**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

No. 05-98-01899-CR

WALTER RAYMOND STOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

**ORDER**

Before Chief Justice Thomas and Justices Ovard and Farris

We **DENY** appellant's motion for rehearing.

S/ DAVID F. FARRIS
JUSTICE, ASSIGNED

1. The Honorable David F. Farris, Former Justice, Second District Court of Appeals, Fort Worth, Texas, sitting by Assignment

Court of Appeals
Fifth District of Texas at Dallas

**JUDGMENT**

| | |
|---|---|
| Walter Raymond Stock,<br>Appellant | Appeal from the Criminal District Court No. 4 of Dallas County, Texas. (Tr.Ct.No.F96-53402-NK) |
| No. 05-98-01899-CR V. | Opinion delivered by Justice Farris, Chief Justice Thomas and Justice Ovard participating. |
| The State of Texas,<br>Appellee | |

Based on the Court's opinion of this date, the judgment of the trial Court is **AFFIRMED.**

Judgment entered November 5, 1999

S/ DAVID F. FARRIS
JUSTICE, ASSIGNED

**AFFIRMED and Opinion Filed November 5, 1999.**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

No. 05-98-01899-CR

WALTER RAYMOND STOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause NO. F96-53402-NK

**MEMORANDUM OPINION**

Before Chief Justice Thomas and Justices Ovard and Farris

Opinion By Justice Farris

1. The Honorable David F. Farris, Former Justice, Second District Court of Appeals, Fort Worth, Texas, sitting by Assignment

Following his open plea to the court, Stock was convicted of driving while intoxicated and sentenced to ten years probation. He was ordered to serve 180 days as a condition of his probation. We overrule all of his points of error and affirm the judgment.

Stock bases his first point of the court's response to a question asked after both sides had closed and the court had sentenced Stock. We overrule point one because the record does not support Stock's complaint that the trial court refused to consider the full range of punishment.

We overrule Stock's second point because the sentence was within the proper range of punishment and there was evidence to support that punishment. *See Jackson v. State,* 680 S.W.2d 809, 814 (Tex.Crim.App.1984).

We overrule point three because the trial court's comment upon which the complaint is based did not cause the

conditions of probation to be vague or indefinite.

We overrule point four because the authority upon which it is based, *Lemon v. State,* 861 S.W.2d 249 (Tex.Crim.App. 1993), is not viable precedent because of amendments to article 42.12 *See* Tex. Code Crim. Proc. Ann. art. 42.12 (Vernon Supp. 1999); *Cotton v. State,* 893 S.W.2d 200, 203-04 (Tex. App. - Fort Worth 1995, no pet.).

We overrule point five because the trial court did not order Stock to do community service while he was in jail.

The judgment is affirmed.

S/ DAVID F. FARRIS
JUSTICE, ASSIGNED

Do Not Publish
Tex. R. App. P. 47

Order issued March 5, 1999

**In The**

**Court of Appeals**

**Fifth District of Texas at Dallas**

No.05-98-01899-CR

WALTER RAYMOND STOCK, Appellant

V.

THE STATE OF TEXAS, Appellee

**ORDER**

The Court DENIES appellant's February 9, 1999 motion to abate for a hearing to have the trial court amend the conditions of probation.

S/ LINDA THOMAS
CHIEF JUSTICE

**CHIEF JUSTICE**
**Linda Thomas**
**JUSTICES**
**Sue LaGarde**
**Ed Kinkeade**
**John Ovard**
**Frances Maloney**
**Joseph B. Morris**
**Mark Whittington**
**Tom James**
**Carolyn Wright**
**Jim Moseley**
**David L. Bridges**
**John R. Roach**
**Michael J. O'Neill**

**Lisa Rombock**
**Clerk of the Court**
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Court of Appeals
Fifth District of Texas at Dallas

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October 6, 1999

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Kim Schaefer
Dallas County District Attorney's Office
Frank Crowley Courts Building
133 N. Industrial Blvd., LB-19
Dallas, Texas 75207

Re: 05-98-01899-CR
Walter Raymond Stock v. The State of Texas

Counsel:

The Court has determined that oral argument will not significantly aid it in determining the legal and factual issues presented in the appeal. Accordingly, the appeal will be submitted without oral argument on November 5, 1999, to a panel consisting of Chief Justice Thomas and Justices Ovard and Farris. See TEX.R.APP.P. 39.8

Sincerely,

S/ LISA ROMBOCK
Clerk

**Order issued on October 29, 1999**

**In the**
**Court of Appeals**
**Fifth District of Texas at Dallas**

---

**No. 05-98-01899-CR**

---

**WALTER RAYMOND STOCK, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the Criminal District Court Number Four**
**Dallas County, Texas**
**Trial Court Cause No. F96-53402-NK**

---

**ORDER**

Before Justice Thomas, Ovard, and Farris

Appellant Walter Raymond Stock, filed a Motion for Published Opinion and a Motion to Strike Appellee's Brief on

October 25, 1999. We **DENY** the motion to strike appellee's brief. We **DENY** the motion for a published opinion on the basis that it is premature.

S/ LINDA THOMAS
CHIEF JUSTICE

Tx 7207129 U.S.Postage

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS, 78711

April 5, 2000 Austin 0.20
COA# 05-988-01899-CR
RE: Case No. 0445-00 APR 05' 00
STYLE: STOCK, WALTER RAYMOND

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

PAUL. R. SHUNATONA
211 N. RECORD
SUITE 450
DALLAS, TEXAS 75201

75202+3370 IIII

Filed in the 5th Court of Appeals
1999, October 25, P.M. 4:15
Lisa Rombock, Clerk

NO. 05-98-01899-CR

IN THE

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

---

WALTER RAYMOND STOCK
Appellant

vs.

THE STATE OF TEXAS,
Appellee

---

An Appeal from the Criminal District Court No. 4

Dallas County, Texas

F96-53402-NK

---

MOTION FOR PUBLISHED OPINION

---

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW WALTER RAYMOND STOCK, Appellant in the above-styled and numbered cause and files this his Motion For Published Opinion. This case involves and appeal of a Guilty Plea. Appellant was found guilty at trial of Driving While Intoxicated, enhanced to a felony. The Appellant has made his appeal from the Criminal District Court No. 4, of Dallas County, Texas, the Honorable John Creuzot, Judge.

I.

Appellant reasonably believes that the multiplicity of issues raised in this case, many of which are novel, would be excellent opportunity for this court to set guidelines for practitioners and courts in the future and he respectfully requests that this case be published for authoritative value.

WHEREFORE PREMISED CONSIDERED, Appellant Prays this Honorable Court publish this opinion as an authoritative source for the use as guidance by our legal system in future similar cases.

Respectfully Submitted,

S/Paul R. Shunatona
Attorney at Law
211 N. Record. Suite 450
Dallas, Texas 75201
Off (214) 747-8844

Fax (214) 742-7313
Bar Card No. 18328400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document had been forwarded to Kim Schaefer, Assistant District Attorney assigned to this case at the Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, Texas by hand delivery on October 25, 1999.

S/Paul R. Shunatona

Filed in the 5th Court of Appeals
1999, October 25, P.M. 4:16
Lisa Rombock, Clerk

NO. 05-98-01899-CR

IN THE

COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

AT DALLAS

---

WALTER RAYMOND STOCK
Appellant

vs.

THE STATE OF TEXAS,
Appellee

---

An Appeal from the Criminal District Court No. 4

Dallas County, Texas

F96-53402-NK

---

MOTION TO STRIKE APPELLEE'S BRIEF

---

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW WALTER RAYMOND STOCK, Appellant in the above-styled and number cause and files this his Motion to Strike Appellee's Brief. This is an appeal of a Guilty Plea. Appellant was found guilty at trial of Driving While Intoxicated, enhanced to a felony. The Appellant makes his appeal from the Criminal District Court No. 4, of Dallas County, Texas, the Honorable John Creuzot, Judge.

I.

The Brief for the Appellant, Walter Raymond Stock was filed with this Court on March 15, 1999. The filing of the Appellant's Brief was timely pursuant to an order issued by this Court on January 14th, 1999, which granted the Appellant's First Motion to Extend Time for Filing Appellant's Brief. Pursuant to the Texas Rules of Civil Procedure at 38.6(b) the deadline for the filing of the Appellee's Brief was within thirty days after Appellant's brief was filed, which would mean a filing deadline of on or before or April 14th, 1999. The Appellee's filing deadline came and went without a brief being filed by the Appellee. Indeed, the brief of the Appellee was tendered to the Court on or about August 26th, 1999, *approximately four and one-half (4 1/2) months late*. No motion to extend time for filing of the appellee's brief was filed with this Honorable Court pursuant to Texas Rules of Appellate Procedure at 10.5(b). Without the motion to extend time for appellee's brief the brief of the Appellee should not have been accepted by this Court. Accordingly, for the reasons, the brief of the Appellee should be stricken by the

Court and not considered for any purpose.

WHEREFORE PREMISED CONSIDERED, Appellant Prays this Honorable Court Strike the Brief of the Appellää, The State of Texas, and not consider same for any purpose whatsoever.

Respectfully Submitted,

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Attorney at Law
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Dallas, Texas 75201
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Fax (214) 742-7313
Bar Card No. 18328400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to Kim Schaefer, Assistant District Attorney assigned to this case at the Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, Texas by hand delivery on October 25, 1999.

S/Paul R. Shunatona

Filed in the 5th Court of Appeals
1999, November 19, P.M. 4:07
Lisa Rombock, Clerk

NO. 05-98-01899-CR
IN THE
Court OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

---

WALTER RAYMOND STOCK
Appellant

vs.

THE STATE OF TEXAS,
Appellee

---

An Appeal from the Criminal District Court No.4

Dallas County, Texas

F96-53402-NK

---

MOTION FOR REHEARING

---

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW WALTER RAYMOND STOCK, Appellant in the above-styled and numbered cause and files this his Motion for Rehearing. This case involves an appeal of a Guilty Plea in which the Appellant was found guilty of driving while intoxicated enhanced to a felony. The Appellant made his appeal from the Criminal District Court No. 4 of Dallas County, Texas, the Honorable John Creuzot, Judge.

I.

Basis of Motion

Appellant respectfully requests a rehearing on this case because it is undersigned counsel's respectful opinion that it is obvious that the case was not adequately considered by the court when it was originally decided on November 5th, 1999, *which was the same day the case was submitted to the Court.* Further, because Appellant was thwarted in almost every attempt to assert his rights in this appeal, the Appellant has been deprived the due process of law.

II.

Factual Summary and Argument

The Appellant's brief in this case consisted of thirteen double spaced pages, seven of which were substantive argument. The State of Texas, Appellee, submitted a brief seventeen pages long, of which twelve pages were substantive argument. The "Memorandum Opinion" of this court dated of November 5th, 1999, is but a mere two pages long with

approximately one page of substance comprising a total of approximately 234 words by the count of the Appellant's attorney. The Appellant submitted 5 points of error. By the count of the Appellant's attorney, on the average, each point of error was disposed with by the court at a mere 38 words per point of error. In regard to Points of Errors Nos. 1, 3, and 5, the court's opinion cites absolutely no law whatsoever for it's ruling, and instead makes only bald assertions of fact findings, instead of conclusions of law. The court's opinion is attached hereto as Exhibit "A".

> In regard to Point of Error No. 1 this court stated:
>
> "We overrule point one because the record does not support Stock's complaint that the trial court refused to consider the full range of punishment".

Nothing could be further from the truth. As submitted in the Appellant's brief the Reporter's

Record reflects at page 63 the following exchange:

> Mr Johnson: Will you *consider* work release?
> The Court: *No.* Step over there to the Bailiffs. (Emphasis added)

The record reflects that the full range of punishment was not considered and the court's finding of fact in this regard

is erroneous. This mere finding of fact without reliance on statute or case law effectively precludes consideration of this point by the Court of Criminal Appeals on a petition for discretionary review. Indeed, in response to Appellant's Point of Error No. 1, the State submitted approximately four pages in response relying on numerous statutes and case law. The summary of the State's argument was (1) that the refusal to consider work release was not ripe for an appellate review: (2) that the Appellant did not show that the trial court did not consider work release as an option; (3) that the Appellant has no substantive right to have the court consider or grant work release; (4) and the denial of work release does not contravene any statutory or constitutional provisions because the punishment falls within the applicable statutory range. The Appellant respectfully requests that this court reconsider this issue and present the *legal* justification for the court's ruling, if any.

In Point of Error No. 2, the Appellant raised the issue of abuse of discretion but the court did not even decide that issue and wholly avoided the Appellant's complaint. The court merely stated that there was evidence to support the punishment and that the punishment was within the proper range. The response in the State's brief devoted approximately two pages of substantive argument on this point.

In regard to Point of Error No. 3, this court again made a factual conclusion that the trial court's comments did not cause the conditions of probation to be vague or indefinite. This court did not indicate the legal basis for this finding, and did not even discuss the factual assertions and the legal

arguments submitted by the Appellant in it's 27 word dismissal of the point of error. It should be noted that the State's response to the Appellant's Point of Error No. 3 was over a page long of substantive argument. This point of error was not adequately considered.

In regard to Point of Error No. 5, this court's factual finding that the trial court did not order the Appellant to do community service while in jail was a mere 21 words long. In Appellant's brief it is clearly stated that the trial court, in it's written condition's of probation, required Appellant to do 160 hours of community service, but that the Judge never stated same in the hearing held on the Appellant's plea of guilty. Instead, the only direction the court made was for the Appellant to go "into the jail's chemical dependency program where you will get further treatment and all that you have learned and gathered up you can help other poor folks there in that program". (R.R. at 62, C.R. at 45). The Appellant asks this court that if the statement of the Judge from the bench was not an order, then what was it? Does this court's finding mean that Judge Creuzot's formal statements from the bench have no weight and do not mean what they say? Can the Appellant then simply disregard this order of the court without threat of contempt or probation revocation? Clearly the court intended the Appellant to go into the jail chemical dependency center and do what the court ordered him to do which was "help other poor folks there in that program". No legal basis having been relied upon by this court, the Appellant requests reconsideration.

III.

Due Process Violations

In a motion filed with this court on October 25th, 1999, the Appellant moved to strike the Appellee's brief for the reasons that the Appellee's brief was not timely filed within 30 days after the Appellant's brief was filed. Texas Rules of Appellate Procedure at 38.6 (b). The Appellee's deadline came and went without the Appellee's brief being filed and was in fact filed over four months late. No motion to extend time for the filing of the Appellee's brief was filed with this court pursuant to Texas Rules of Appellate Procedure at 10.5 (b). In the court's wholesale disregard of the Texas Rules of Appellate Procedure this court is essentially allowing the State to thumb it's nose at the applicable procedural rules, and as such, the court has taken itself out of being a neutral and detached court of law. Would the court ever allow the same flagrant disregard of procedural rules in a civil appeal? The Appellant submits this rule breaking would never be tolerated in a civil appeal. The court has essentially assisted the State in the appeal. This is significant because this court relied on the argument set forth by the State in it's brief in most points, and relied on a case submitted by the State in it's brief, *i.e.* Cotton v. State 893 S.W. 2nd 200 (Tex.App.- Fort Worth 1995, No pet.), in it's summary disposal of Point of Error No. 4.

IV.

Other Procedural Due Process Violations

In the Appellant's brief filed March 15th, 1999, oral argument was requested. On October 6th, 1999, this court denied the Appellant oral argument. On August 25th, 1999, the

Appellant filed a Motion to Strike Appellee's Brief for the reasons stated heretofore, and also filed a Motion for Published Opinion. On October 29th, 1999, the court denied the Motion to Strike Appellee's Brief and gave no reason for doing so. The court further denied the Motion for a Published Opinion on the basis that it was premature. The case was submitted to the court on November 5th, 1999, and *the case was decided the same day*. The Appellant was not allowed an opportunity to cure his "premature" Motion for Published Opinion. This court in it's decision regarding three points of error made only findings of fact and did not rule on whether the factual matters asserted by the Appellant in his brief were allowed by law. For these reasons, the Appellant was denied due process of law as guaranteed him by the Constitution of the United States, and the Constitution of the State of Texas.

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court grant a rehearing in this case, grant oral argument in this case, strike the brief of the Appellee, publish this Court's opinion in this cause, and for further relief at law and in equity to which the Appellant may show himself justly entitled.

Respectfully submitted by,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the Assistant District Attorney, Kim Schaefer assigned to this case at the Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, Texas by hand delivery on November 19th, 1999.

S/Paul R. Shunatona

Supreme Court, U.S.
FILED
AUG - 4 2000
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(2)

No. 00-50

In The

# Supreme Court of the United States

R.E.W.,

*Petitioner,*

v.

C.A.M. & ANOTHER,

*Respondents.*

**On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## STATUTORY PROVISIONS INVOLVED

**MASSACHUSETTS GENERAL LAWS, CHAPTER 209C, §5(a)**

**§5. Persons entitled to maintain actions or execute voluntary acknowledgment of parentage; parties**

(a) . . . if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints to establish paternity under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.

## STATEMENT OF THE CASE

The Respondents hereby address certain misstatements of fact and law contained in the Petition.

In his original complaint filed with the Essex County Probate and Family Court of Massachusetts, R.E.W. sought to establish paternity pursuant to Massachusetts General Laws Chapter 209C. C.A.M. moved to dismiss for lack of standing, asserting that c. 209C §5(a) prohibits anyone from bringing an action to establish paternity of a child born to a married woman other than a person who is or was the woman's husband at the time of the child's birth or conception.

R.E.W. then filed an amended complaint under Massachusetts General Laws c. 215 §6 based on the holding of the Supreme Judicial Court of Massachusetts in *C.C. v.*

*A.B.*, which allows a putative father in such circumstances to bring a paternity action under the Probate Court's general equity jurisdiction where he can demonstrate by clear and convincing evidence that he has a substantial relationship with the child. *C.C. v. A.B.*, 409 Mass. 679, 690-691, 550 N.E.2d 365, 372-373 (1990). The case left open the question of what rights, if any, a putative father might have in a case where the father demonstrates that his failure to form a substantial relationship with the child was due to the actions of the mother. *Id.*, 406 Mass. at 690, n. 10; 550 N.E.2d at 372, n. 10.

A preliminary hearing as mandated by *C.C. v. A.B.* was held to determine whether R.E.W. could establish a parent-child relationship or alternatively, that he had been prevented from having such a relationship by the actions of the mother. Pet. at 2a, 12a-13a. The question is by its very nature fact-based. *C.C. v. A.B.*, 409 Mass. at 690, 550 N.E.2d at 372. R.E.W.'s "Proposed Findings of Fact, Rationale and Conclusions of Law" submitted at the conclusion of the hearing cited in passing a few cases of this court, but at no time challenged the constitutionality of the preliminary standing test established in *C.C. v. A.B.*, or claimed that the standard is not consistent with due process or with the decisions of this court.

After a three-day hearing, the probate judge made detailed and comprehensive findings of fact in which he found that R.E.W.'s failure to form a relationship with the child was not due to C.A.M.'s actions, but rather to his own indifference. Pet. at 6a-14a. The Petitioner misstates both the record and the judge's factual findings when he claims that R.E.W. could not have known that he might be the child's father until March 9, 1998, approximately two

(2) months after the child's birth. Pet. at 7. To the contrary, the trial judge specifically found that R.E.W. was on notice of his possible paternity since May 1997 when C.A.M. told him she was pregnant. Pet. at 9a-10a. This finding was supported by Petitioner's own testimony, in which he admitted on cross-examination that he was aware of his possible paternity in May 1997.

The probate judge found that, "[d]espite being in regular communication with one another and despite [R.E.W.] knowing that he had intercourse with [C.A.M.] at about the time the child she was carrying could have been conceived, there was no evidence that during the pregnancy [R.E.W.] ever suggested to [C.A.M.] that he was interested in asserting any possible claim to paternity." Pet. at 9a-10a. The judge also found that during the initial months of the child's life, R.E.W. made no effort to form a relationship with the child until his relationship with C.A.M. had broken down. Pet. at 14a. C.A.M.'s husband, in contrast, assumed the role of the child's father, was present at the birth, was listed as the father on the birth certificate, acknowledged the child as his own, participated actively in caring for the child, as well as for the child's older sibling, and treated the child in all respects as his biological son. Pet. at 8a. The probate judge's findings were based on a well-developed factual record and on credibility determinations which must be accepted unless clearly erroneous. *M.J.C. v. D.J.*, 410 Mass. 389, 394-395, 572 N.E.2d 562, 565 (1991).

Based on these facts, the probate judge concluded that R.E.W. had, at the very least, failed to show by clear and convincing evidence that C.A.M.'s actions were the

cause of his failure to establish, or even attempt to establish, a relationship with the child, and accordingly dismissed the complaint. Pet. at 14a. Thus, as a factual matter, the issue left open in *C.C. v. A.B.* was never reached. *M.J.C. v. D.J.*, 410 Mass. at 389, 572 N.E.2d at 565. The constitutionality of the two-part test in *C.C. v. A.B.* was not addressed in the decision below because the issue had never been presented to the probate court.

R.E.W.'s arguments on appeal were based on challenges of the probate judge's findings of fact. Pet. at 17a. Since those findings were based upon credibility determinations and were supported by the record, the Appeals Court declined to set them aside. *Id.*

In his petition for further appellate review, R.E.W. similarly failed to clearly address any constitutional issue. R.E.W.'s argument that the two-part test of *C.C. v. A.B.* is not consistent with due process is raised for the first time in the Petition.

## REASONS FOR DENYING THE PETITION

### I. THE PETITIONER HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT A FEDERAL ISSUE WAS PROPERLY PRESENTED TO OR ADDRESSED BY THE STATE COURT.

Since the decision below was decided as a factual matter under applicable state law, the Petitioner has failed to show that this matter involves any federal question. Moreover, even if a federal question exists, Petitioner has failed to meet his burden of showing that the

question was timely and properly raised in the state court.

In reviewing a state court judgment, this court has, with very rare exceptions, refused to consider a federal claim unless it was either addressed by or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). The Petitioner has the burden of showing that the issue was properly presented so that the state court had a fair opportunity to address the federal question. *Id.* In order to meet this burden, the Petitioner must establish that the federal issue was raised in the state court in a timely manner and as required by state law. *Id.*

The Petitioner failed to present a federal issue to the trial court. The mere citation of federal cases is insufficient to inform a state court that it has been presented with a federal claim. *Id.*, 520 U.S. at 88, 117 S.Ct. at 1030, 137 L.Ed.2d, *citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n. 9, 107 S.Ct. 1940, 1948, n. 9, 95 L.Ed.2d 474 (1987). Federal constitutional issues which are not raised at trial will not be heard on appeal in the Massachusetts appellate courts. *LaPointe v. License Board of Worcester*, 389 Mass. 454, 457, 451 N.E.2d 112, 115 (1983).

The Petitioner has failed to demonstrate that the federal question was clearly presented to the Massachusetts Appeals Court, which correctly characterized the appeal as a challenge to the probate judge's findings of fact. Pet. at 17a. The Petitioner has also failed to demonstrate that the issue was clearly presented to the Supreme Judicial Court of Massachusetts, which summarily denied

further appellate review. Pet. at 18a-19a. "[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

Thus, even if any federal issue is raised in the Petition, the Petitioner has failed to make an affirmative showing that the Massachusetts state courts had an opportunity to address the federal issue, and the Petition should be therefore denied.

## II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner argues that application of the two-part test set forth in *C.C. v. A.B.* denied him due process. However, the Petitioner has failed to show that the decisions of this court would entitle him to greater due process rights than those afforded him in the Massachusetts trial court. In fact, the Massachusetts highest court has gone beyond the decisions of this court in affording due process rights to putative fathers in R.E.W.'s circumstances.

In 1987, Massachusetts enacted a paternity statute which precluded a putative father from establishing paternity of a child conceived or born during the mother's marriage to another, or within 300 days of the termination of the marriage. Massachusetts General Laws, c. 209C §5(a). In *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this court

upheld a similar provision of a California law. The plurality opinion held that the putative father did not have a protected liberty interest in a relationship with the child. *Id.*, 491 U.S. at 121-130, 109 S.Ct. at 2341-2346, 105 L.Ed.2d 91.

In *C.C. v. A.B.*, the plaintiff, who sought to establish his paternity of a child born to A.B. during her marriage to another man, challenged the constitutionality of the prohibition in c. 209C §5(a). The Supreme Judicial Court of Massachusetts held that the statute did not preclude the putative father in such circumstances from bringing a petition for paternity under the general equity jurisdiction of the Probate Court. *C.C. v. A.B.*, 406 Mass. at 682, 550 N.E.2d at 368. The Massachusetts court took note of the fact that four Justices of this court felt that a biological father has a protected interest in a relationship with the child under certain circumstances. *Id.*, 406 Mass. at 686, 550 N.E.2d at 370, *citing Michael H.*, 491 U.S. 110, 109 S.Ct. 2349-2363, 105 L.Ed.2d at 91 (dissenting opinions of Brennan and White, JJ). However, the Massachusetts court determined that the protected interest is not based solely on biology, but arises only when a substantial relationship exists with the child. *Id., comparing Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) and *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), *with Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1028, 31 L.Ed.2d 551 (1972). The Massachusetts highest court's position on this issue is similar to the position taken by Justice Brennan in his dissent in *Michael H.*, in which he stated that " . . . although an unwed father's biological link to his

child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." *Michael H.*, 491 U.S. at 142-143; 109 S.Ct. at 2352; 105 L.Ed.2d 91 (Brennan, J. dissenting).

The preliminary standing test was established by the Massachusetts court as a means of balancing the due process interest of a putative parent in a developed relationship with a child against the strong public policy of protecting the family unit. *C.C. v. A.B.*, 406 Mass. at 691, 550 N.E.2nd at 372-373. The state has a legitimate interest in protecting the marital family. *Michael H.*, 491 U.S. at 123-124, 129, 109 S.Ct. at 2342, 2345, 105 L.Ed.2d 91. In devising this test, the Massachusetts Supreme Judicial Court gave thorough consideration to this court's decisions, and in fact went beyond this court's decision in *Michael H.* in affording due process rights to putative fathers even where the child's mother is married to another. Therefore, in asking this court to invalidate the Massachusetts case law, the Petitioner is also asking this court to revisit its decision in *Michael H.*, a request that is utterly groundless since no federal question was properly raised below.

The decision below was decided on factual grounds under the principles of *C.C. v. A.B.* Petitioner has advanced no reasons why the two-part test of *C.C. v. A.B.* offends concepts of due process as articulated by this court. The Petition should therefore be denied.

## CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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